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IN THE SUPREME COURT OF THE STATE OF IDAHO

ACTION COLLECTION SERVICE, INC.
an Idaho Corporation,

Plaintiff/ Respondent,

vs.

HARMONY L. MCCULLOUGH aka
BLACK,

Defendant/Appellant.

SUPREME COURT NO. 44466-2016

RESPONDENT'S BRIEF

Appeal from the District Court of the Third Judicial District
of the State of Idaho, In and For the County of Canyon

The Honorable George Carey, District Judge
The Honorable Jerold W. Lee, Magistrate Judge
Presiding

ATTORNEY FOR APPELLANT

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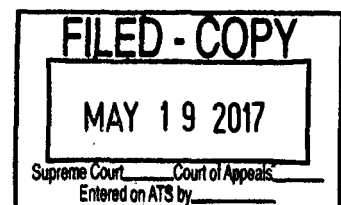


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I.

STATEMENT OF THE CASE

A. Statement of Facts Relevant to the Issues Presented.

In response to a series of monthly statements, Defendant made payments to the Idaho Department of Juvenile Corrections ("IDJC") for the support and treatment of her minor daughter.¹ R. Sealed Exhibits, p. 379. When the Defendant failed to continue to make payment, IDJC assigned the Defendant's account to Action Collection Service, Inc. ("ACS") pursuant to a written contract and blanket assignment executed on May 11, 2006. R. Augmented Record, pp. 684-686; R. Sealed Exhibits, pp. 405-412. Defendant was not a party to the written contract or the blanket assignment, and both ACS and IDJC operated at all relevant times with the understanding that the contract and blanket assignment were in full force in effect. R. Augmented Record, p. 685.

II.

ATTORNEY'S FEES ON APPEAL

ACS requests attorney's fees on appeal. This request is based on Idaho Code Section 12-120(1) and 12-121. ACS also requests fees to the extent that this Court determines that the appeal was brought or pursued frivolously, unreasonably, or without foundation. *See Hoffer v.*

¹ Appellant asserts in a footnote that IDJC's creation was unconstitutional and that the validity of IDJC is in dispute. This claim was never presented to the District Court and has not been properly preserved or presented on appeal. *Schiewe v. Farwell*, 125 Idaho 46, 49, 867 P.2d 920, 923 (1993)). Idaho Appellate Rule 35(a)(6) requires that the Defendant identify findings of fact, statements of law, or applications of law to the facts which are arguably in error. *Vulk v. Haley*, 112 Idaho 855, 857, 736 P.2d 1309, 1311 (1987). Issues on appeal that are not supported by propositions of law or authority with reference to the record are deemed waived. *Eagle Water Co., Inc. v. Roundy Pole Fence Co., Inc.*, 134 Idaho 626, 7 P.3d 626 (2000).

Shappard, 160 Idaho 870, 380 P.3d 681 (2016); *DeChambeau v. Estate of Smith*, 132 Idaho 568, 572, 976 P.2d 922, 926 (1999).

III.

ARGUMENT

A. The contract between IDJC and ACS is ambiguous as to its termination date.

The District Court found that the contract between IDJC and ACS was ambiguous and that both ACS and IDJC treated the contract as being in full force and effect until one party gives the other written notice of termination under Paragraph 13, a condition that had not occurred. R. Augmented Record, pp. 684-686; Tr. Court Trial July 7, 2016 – July 9, 2016, pp. 48, L. 14 – p. 49, L. 1, 52, ll. 10-19., Tr. 114-116. Consequently, the District Court found that the parties had not terminated their contract. Defendant does not challenge these factual findings. *Woods v. Crouse*, 101 Idaho 764, 765, 620 P.2d 798, 799 (1980)(on appeal, the court must presume that the evidence justifies the decision and that the findings are supported by substantial evidence); *Clear v. Marvin*, 86 Idaho 87, 383 P.2d 346 (1963)(finding that error is never presumed on appeal and the burden of showing it is on the party alleging error). Defendant only challenges the finding that the contract was ambiguous.

A contract is ambiguous when it is capable of more than one reasonable interpretation on a given issue. *Brown v. Perkins*, 129 Idaho 189, 193, 923 P.2d 434, 438 (1996). To determine whether or not a contract is ambiguous, the court must view the agreement as a whole. *Mountainview Landowners Co-op. Ass'n, Inc. v. Cool*, 142, Idaho 861, 865, 136 P.3d 332, 336, (2006). If the contract is ambiguous, its interpretation is a question of fact and the court should

consider the conduct of the parties to the contract and the parties' practical interpretation of it. *Pocatello Hosp., LLC, v. Quail Rdg. Med. Investor, LLC*, 156 Idaho 709, 720, 330 P.3d 1067 (2014).

The opening paragraphs of the Independent Contractor Agreement state as follows:

This agreement is made this day of 6/1/06, and will extend through 5/31/07. This agreement is between the Idaho Department of Juvenile Corrections . . . and (the "Client"), Action Collection Service Inc., (the "Independent Contractor").

...
NOW THEREFORE, in consideration of the foregoing and the mutual promises and covenants herein contained, the parties agree as follows:

R. Sealed Exhibits, p. 405. Paragraph 13, provides for the term and the method of termination.

It reads:

13. Term. This Agreement's term shall begin on the date hereof and shall remain in force until terminated. Either party may terminate the Agreement at any time by giving fifteen (15) days' written notice to the other.

R. Sealed Exhibits, p. 407.

It is argued by the Defendant that the first paragraph provides that the contract terminated on May 31, 2007. Black's Law Dictionary defines the words "extend" and "through" as terms that lend themselves to a great variety of meanings. Black's Law Dictionary at 583, 1481 (6th ed., 1990). Those terms could just as easily be interpreted to mean continue past May 31, 2007. Moreover, the opening paragraph must be read in connection with the entire agreement. There, the contract states that the parties agree to the terms and conditions set forth below the introductory paragraphs, which includes a provision that the contract will remain in effect until terminated by giving notice. Consequently, the opening paragraph alone does not establish a

clear end date or that the contract had been terminated, especially when read in light of Paragraph 13, the written blanket assignment, and the conduct of the parties to the contract.

The blanket assignment has no express termination date. R. Sealed Exhibits, p. 410. It simply provides that an assignment occurs when IDJC “now or hereafter tender[s] to [ACS] listed accounts . . .” Id. At trial, the unrebutted evidence established that IDJC listed the Defendant’s account with ACS in accordance with the terms and conditions of its agreements, which was accepted by ACS and pursued in the same manner as it had done with all the other accounts provided to it by IDJC since 2006. R. Sealed Exhibits, pp. 378, 411; Tr. Court Trial July 7, 2016 – July 9, 2016, pp. 49-52, pp. 84-88, pp. 105-106, pp. 115-116, p. 127. While this evidence supports the District Court’s conclusion that the contract had not ended, it would also support a conclusion, if it had expired, that agreement was modified by the conduct of the parties, and thus was operational when Defendant’s obligation was assigned to ACS. *Ore-Ida Potato Products Inc.*, 83 Idaho at 296(holding that the modification of an agreement “may be implied from a course of conduct in accordance with its existence and assent may be implied from the acts of one party in accordance with the terms of the change proposed by the other”).

B. Defendant’s financial obligation is a “debt” within the meaning of Idaho Code Section 67-2358.

Defendant asserts that the assignment in this case failed because there was no “debt” as defined by Idaho Code Section 67-2358. This issue was not presented to the trial court. Originally, Defendant argued that the court erred in its findings and conclusions because Idaho Code Section 20-524 does not “allow for the assignment of the right to create a debt.” R.

Augmented Record, p. 722. This original issue is not presented here, and has been waived. *Schiewe*, 125 Idaho at 49. As such, Defendant's presentation of the current question for the first time on appeal is fatal to the issue. *Id.*

Even if the issue was properly preserved and presented, the plain language of Idaho Code Section 67-2358 allows for the assignment in this case. That statute reads in relevant part as follows:

- (1) (a) Public agencies . . . *may* retain by written contract a collection agency . . . for the purpose of collecting public debts owed by any person, including any restitution that is being collected on behalf of a crime victim.
- ...
- (4) For purposes of this section, the term "*debt*" shall include all debts, including the fee required under subsection (1)(b) of this section, except as otherwise provided by law.

I.C. § 67-2358(emphasis added).² The statute in clear language provides that the term "debt" means all debts. *See Martin v. State Farm Mut. Auto. Ins. Co.*, 138 Idaho 244, 246, 61 P.3d 601, 603 (2002)(holding that where a statute is unambiguous, statutory construction is unnecessary and courts are free to apply the plain meaning).

Defendant's financial obligation to reimburse IDJC is a debt within the meaning of the statute. Whether or not a court ordered a particular dollar amount is inconsequential to the

² Idaho Code Section 67-2358 provides that a public agency "may retain by written contract" a collection agency, it does not provide that the public agency shall retain a collection agency by written contract. *See Rife v. Long*, 127 Idaho 841, 848, 908 P.2d 143, 150 (1995) (stating that "This Court has interpreted the meaning of the word 'may' appearing in legislation, as having the meaning or expressing the right to exercise discretion.").

issue.³ Defendant's financial obligation to pay, and IDJC's assertion of that obligation is of critical importance. Webster's defines "debt" as "something owed; obligation." Webster's Collegiate Dictionary at 320 (11th ed. 2003). Black's Law Dictionary defines "debt" as "[l]iability on a claim" Black's Law Dictionary at 488 (10th ed., 2014); Black's Law Dictionary at 403 (6th ed., 1990). In applying the plain meaning of the term, Defendant's obligation, and IDJC's claim for a particular sum, fits squarely within the meaning of the term "debt" as stated in Idaho Code Section 67-2358(4). This is especially true in cases, like this one, where the obligated parent makes payments towards the obligation prior to any assignment or outside collection efforts.⁴ R. Sealed Exhibits, p. 379. Payment is an acknowledgment of that obligation.

C. The District Court did not abuse its discretion when it found Defendant liable to pay for the care and treatment of her minor daughter.

Defendant argues that the District Court abused its discretion when it determined that the Defendant owed a reasonable sum to cover the support and treatment of the Defendant's minor child while in the care and custody of IDJC. In support of this argument, Defendant claims that she did not have due notice of the claim.

ACS's claim that the Defendant owed a reasonable sum to cover her daughter's care and treatment has been the subject of argument by both ACS and Defendant since 2012. ACS's

³ Defendant mischaracterized Director Harrigfeld's testimony. Director Harrigfeld testified in response to counsel's question concerning reimbursements hearings, that she "can't answer that. That is mostly done by our deputy attorney general that goes to those hearings." Tr. Court Trial July 7, 2016 – July 9, 2016, pp. 383, ll. 3-11.

⁴ Defendant's payments to IDJC followed a series of statements sent to her by IDJC. R. pp. 379, 411; Tr. Court Trial July 7, 2016 – July 9, 2016, pp. 102-103; pp. 288, L. 23 – p. 289. L. 1; Tr. Court Trial February 19, 2016, p. 191, L. 20 – p. 193, L. 5 – p. 194, L.13, p. 196, L. 13 – p. 202 L. 20. This evidence supports the conclusion that even the Defendant acknowledged her financial obligation/debt to IDJC.

claim was reasserted in its Amended Complaint. R. Augmented Record, pp. 220-229. There, ACS plead that IDJC provided Defendant's daughter with support and treatment from September 27, 2007 through July 5, 2009, and that Defendant was obligated to pay for the reasonable value of those services in accordance with, among other things, Idaho Code Section 20-524. R. Augmented Record, pp. 220-229, 267. Defendant was aware of these claims and defended against them vigorously. Thus, it was not an abuse of discretion or clear error for the District Court to determine that ACS's claims were timely, and rule on those claims following the presentation of all the evidence. R. Augmented Record, pp. 767-775. *See Coward v. Hadley*, 150 Idaho 282, 286, 246 P.3d 391, 395 (2010)(holding that the factual findings made after a court trial are reviewed for clear error); *see also Schneider v. Howe*, 142 Idaho 767, 771, 133 P.3d 1232 (2006)(stating that "[a] district court's exercise of discretion will be upheld absent a showing of abuse of discretion").

D. Plaintiff is entitled to attorney fees on appeal.

Whether a party is entitled to attorney fees in Idaho is dependent upon a statute or rule permitting such an award. *Allison v. John M. Biggs, Inc.*, 121 Idaho 567, 568, 826 P.2d 916, 917 (1992). Attorney fees on appeal are similarly dependent upon rule or statute. *Id.*; I.A.R. 41.

Under Idaho Code Section 12-120(1), a prevailing party is entitled to a reasonable attorney's fee fixed by the court. To be awarded fees under this statute, the claim must be plead in an amount less than \$35,000 and the plaintiff must have given the defendant "written demand for the payment . . . not less than ten (10) days before the commencement of the action; provided, that no attorney's fees shall be allowed to the plaintiff if the court finds that the defendant

tendered to the plaintiff, prior to the commencement of the action, an amount at least equal to ninety-five percent (95%) of the amount awarded to the plaintiff.” I.C. § 12-120(1).

In this case, ACS made written demand on the Defendant more than ten days prior to the filing of this lawsuit. R. Sealed Exhibits, p. 385. The amount in controversy was alleged to be less than \$35,000.00 and the Defendant did not tender any payment or offer 95% of the amount awarded. As a result, ACS was entitled to attorney fees as the prevailing party under Idaho Code Section 12-120(1). Because costs and attorney’s fees were authorized by statute below, costs and fees would also be appropriate on appeal. *Latham Motors, Inc. v. Phillips*, 123 Idaho 689, 697, 851 P.2d 985, 993 (Ct.App. 1989).

Attorney’s fees on appeal are also supported by Idaho Code Section 12-121. This appeal is nothing more than an attempt to second guess the District Court in an effort to reargue the facts of this case, and invite this Court to search the record for error. *Vulk v. Haley*, 112 Idaho 855,857, 736 P.2d 1309, 1311 (1987). Idaho Code Section 12-121 gives the courts broad authority to award attorney fees. *Hoffer v. Shappard*, 160 Idaho 870, 380 P.3d 681 (2016).⁵ This statutory authority extends to this Court on appeal. Thus, if this Court is left with the abiding belief that the appeal was pursued frivolously, unreasonably, and without foundation, costs and attorney fees are appropriate. *See DeChambeau v. Estate of Smith*, 132 Idaho 568, 572, 976 P.2d 922, 926 (1999).

⁵ ACS understands that this Court’s decision in *Hoffer* has a starting date of March 1, 2017 for all cases that have not become final as of that date. Here, while the judgment in this case was entered prior to March 1, 2017, this appeal continues and Idaho Code Section 12-121 would be applicable.

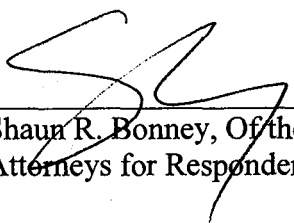
IV.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court affirm the District Court, and award Respondent its costs and attorney's fees on appeal.

DATED this 19th day of May, 2017.

By


Shaun R. Bonney, Of the Firm
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of May, 2017, I served a true and correct copy of the foregoing by delivering the same to each of the following, by the method indicated below, addressed as follows:

Thomas J. Katsilometes
THOMAS J. KATSILOMETES, PLLC
100 N. Ninth St., Suite 200
P.O. Box 777
Boise, ID 83701

<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
<input type="checkbox"/>	Hand-Delivered
<input type="checkbox"/>	Overnight Mail
<input type="checkbox"/>	Facsimile


Shaun R. Bonney